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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: TS Generalbau GmbH; Thomas Stadlbauer

File: B-246034; B-246036; B-246037; B-246037.2; B-246038; B-246039; B-246040; B-246040.2; B-246042; B-246042.2; B-246043; B-246043.2

Date: February 14, 1992

Michael J. Murphy, Esq., von Maur, Matthews & Partners, for the protester.
Maj. Bobby G. Henry, Jr., and Herbert K. Kelley, Jr., Esq., Department of the Army, for the agency.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. When a protester alleges that it has been improperly suspended or debarred during the pendency of a procurement in which it was competing, the General Accounting Office will review the matter to ensure that the agency has not acted arbitrarily to avoid making an award to the bidder otherwise entitled to the award and also to ensure that minimum standards of due process have been met.

2. Agency had a reasonable basis to suspend an individual, who was authorized to sign contracts for a suspended contractor, since the agency had adequate evidence to impute the suspended contractor's misconduct (involving bribery to obtain government contracts) to the individual.

3. Due process for a suspension requires notice sufficiently specific to enable the suspended party to marshal evidence on its behalf so as to make the subsequent opportunity for response meaningful.

4. Agency is not required to inform persons of proposed suspensions to allow them an opportunity to submit evidence; such evidence is properly presented in the person's post-suspension response to the action.

5. Agency's failure to give proper written notice to an affiliate of a suspended contractor pursuant to Federal Acquisition Regulation § 9.407-1(c) is a procedural defect that does not deprive the affiliate of due process or affect the validity of the rejection of the affiliate's bid based on the suspended contractor's ineligibility, where the

suspended contractor had actual notice of the intended suspension and the ownership and control of the suspended contractor is the same as for the affiliate.

6. Low bidder whose bid was rejected because the firm was properly suspended at the time of award, and award was made to an eligible bidder, is not entitled to the award when the suspension was terminated upon appeal.

DECISION

TS Generalbau GmbH and Thomas Stadlbauer protest the awards of contracts by the Department of the Army under eight invitations for bids (IFB) for various construction projects in Germany.[1] The protesters allege that their low bids were improperly rejected as a result of suspensions that the

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[1]B-246034 is TS Generalbau's protest of the award under IFB No. DAJA04-91-B-0191 for the repair of central heating at Conn Barracks, Schweinfurt.

B-246036 is TS Generalbau's protest of the award under IFB No. DAJA04-91-B-0244 for the replacement of sewer lines at Warner Barracks III, Bamberg.

B-246037 and B-246037.2 are TS Generalbau's and Mr. Stadlbauer's protests, respectively, of the award under IFB No. DAJA04-91-B-0255 for general repair work at Giebelstadt Army Airfield.

B-246038 is TS Generalbau's protest of the award under IFB No. DAJA04-91-B-0214 for general repair work at Giebelstadt Army Airfield.

B-246039 is TS Generalbau's protest of the award under IFB No. DAJA16-91-B-0151 for exterior weathersealing at Wildflecken Training Area.

B-246040 and B-246040.2 are TS Generalbau's and Mr. Stadlbauer's protests, respectively, of the award under IFB No. DAJA04-91-B-0218 for the repair of sanitary facilities at Leighton Barracks, Wuerzburg.

B-246042 and B-246042.2 are TS Generalbau's and Mr. Stadlbauer's protests, respectively, of the award under IFB No. DAJA04-91-B-0189 for the installation of sanitary facilities at the Tactical Air Command site in Massbach.

B-246043 and B-246043.2 are TS Generalbau's and Mr. Stadlbauer's protests, respectively, of the award under IFB No. DAJA04-91-B-0121 for general repair work at Leighton Barracks, Wuerzburg.

Army arbitrarily and improperly imposed on the protesters to prevent the protesters from receiving the awards.

We deny the protests.

On June 25, 1991, prior to the Army issuing the IFBs, a contracting officer had recommended Firm Andreas Boehm, Mr. Stadlbauer, and other parties for suspension as a result of an ongoing investigation of the alleged bribery of government employees by Boehm and other firms. Boehm was suspended from contracting with the government on September 17. Mr. Stadlbauer was suspended on the same date. The suspending officer made his decision to suspend Mr. Stadlbauer pursuant to Federal Acquisition Regulation (FAR) §§ 9.406-5(b); 9.407-5 imputing Boehm's misconduct to Mr. Stadlbauer. This decision was based entirely on a copy of Boehm's solicitation mailing list application, standard form (SF) 129, which authorized Mr. Stadlbauer to sign offers and contracts on behalf of Boehm. Mr. Stadlbauer states that he received notice of the suspension on September 19. TS Generalbau, a German corporation solely owned and controlled by Mr. Stadlbauer, was not specifically suspended at that time.

Bid openings for the IFBs occurred from September 16 through September 24, 1991. Either TS Generalbau or Mr. Stadlbauer was the apparent low bidder on each of the IFBs. The Army rejected the low bids because Mr. Stadlbauer was listed as a suspended contractor. Awards of all eight contracts were made to the next eligible bidders between September 26 and September 30.

The protests of the awards were filed with our Office on October 3. The Army suspended performance of the contracts pending our decision pursuant to 4 C.F.R. § 21.4(b) (1991). On November 1, during the course of these protests, the Army notified TS Generalbau that it was suspended as an affiliate of Mr. Stadlbauer pursuant to FAR § 9.407-1(c).

On November 4, Mr. Stadlbauer and TS Generalbau appealed the suspensions to the cognizant Army suspension and debarment official. In this appeal, Mr. Stadlbauer demonstrated to the suspension official's satisfaction that he only had limited involvement with Boehm's contracting activities. He explained that his association with Boehm was as an independent contractor retained for technical advice on preparing bids, and for inspection services on construction sites. He asserted that he was unaware of and had no reason to know of Boehm's alleged misconduct. The suspension official terminated the suspensions of Mr. Stadlbauer and TS Generalbau effective November 6.

FAR provides that contractors debarred, suspended, or proposed for debarment are excluded from receiving contracts, and that agencies shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors unless the agency's head or his designee determines that there is a compelling reason for such action. FAR § 9.405(a). Generally, we do not review protests of suspensions and debarments under the FAR, see Spengler Kranarbeiten GmbH, B-234840, Apr. 12, 1989, 89-1 CPD ¶ 375; A&B Wipers Supply, Inc., B-208623, Oct. 21, 1982, 82-2 CPD ¶ 355, since the proper forum for challenging the sufficiency or correctness of the agency's reasons for imposing the suspension is with the agency after notice of suspension is given. FAR § 9.407-3(b); see Transco Sec., Inc. of Ohio v. Freeman, 639 F.2d 318, 322-23 (6th Cir. 1981), cert. denied, 454 U.S. 820 (1981). However, when a protester alleges that it has been improperly suspended or debarred during the pendency of a procurement in which it was competing, we will review the matter to ensure that the agency has not acted arbitrarily to avoid making an award to the bidder or offeror otherwise entitled to the award, and also to ensure that minimum standards of due process have been met. Far West Meats, 68 Comp. Gen. 488 (1989), 89-1 CPD ¶ 547.

Mr. Stadlbauer was suspended after bid opening for three of the contracts, and the protesters allege that the suspensions were imposed by the Army to avoid making award to the protesters. Consequently, we will consider the protests to ascertain whether the agency has put forth sufficient evidence to show the decision not to make an award to the protesters was reasonable and whether the agency has followed proper procedures in suspending the protesters.[2] Far West Meats, supra.

Pursuant to FAR § 9.407-2(a), Boehm was suspended based on adequate evidence that it had bribed government employees in order to obtain contract awards. The protesters do not contest the validity of Boehm's suspension. The Army imputed Boehm's misconduct to Stadlbauer pursuant to FAR §§ 9.406-5(b) and 9.407-5, which provide that the scope of a contractor's suspension may include any individual associated with the contractor who "participated in, knew of, or had reason to know of" the suspended contractor's

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[2] Since bid opening for the remaining five IFBs was after Mr. Stadlbauer's suspension, these protests generally would not be reviewed by our Office. See Auto-X, Inc., B-238046.2; B-238046.3, June 6, 1990, 90-1 CPD ¶ 532. However, we will consider these protests, inasmuch as all of the bid openings here were only days apart and the same suspension action is at issue.

misconduct. As indicated above, this determination was solely based on the SF 129 authorization of Mr. Stadlbauer to sign offers and contracts on behalf of Boehm; there is no indication that the suspending official had any other evidence.[3]

Suspensions are imposed for a temporary period before the suspected misconduct is proven and while an investigation of the contractor is taking place. FAR § 9.407-4. Debarments, on the other hand, are imposed for reasonable periods commensurate with the seriousness of the causes, after proceedings where the person proposed for debarment is afforded the opportunity to dispute facts material to the proposed debarment. FAR §§ 9.406-3; 9.406-4. The purpose of suspensions and debarments is to protect the government's interest from dealing with nonresponsible contractors. For example, contractors who are suspected of fraudulent action or are found to be dishonest may be suspended or debarred. See Transco, 639 F.2d 318, 321; Caiola v. Carroll, 851 F.2d 395, 398 (D.C. Cir. 1988).

Given the fundamental differences between suspensions and debarments, the degree of evidence (and the amount of due process) an agency needs to suspend a party is less than that required for debarment. Horne Bros., Inc. v. Laird, 463 F.2d 1268, 1271 (D.C. Cir. 1972). That is, an agency may suspend a party on the basis of "adequate evidence" of misconduct, FAR §§ 9.407-1(b); 9.407-2, while a debarment must be based upon a conviction or civil judgment or where the cause for debarment is established by the preponderance of the evidence, FAR § 9.406-2.

Thus, the degree of evidence that an agency needs to impute a suspended contractor's misconduct to an individual associated with a suspended contractor, so as to suspend the individual under FAR § 9.406-5(b), is adequate evidence that the individual participated in, knew of, or had reason to know of the misconduct. As defined by FAR, adequate evidence is "information sufficient to support the reasonable belief that a particular act or omission has occurred." FAR § 9.403. As the court in Horne Bros., 463 F.2d 1268, 1271, stated:

> "The 'adequate evidence' showing need not be the kind necessary for a successful criminal prosecution or a formal debarment. The matter may be likened to the probable cause necessary for an

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[3]Although the record is not clear as to whether the contracting officer relied on more than the SF 129 in making his recommendation, the record shows that this is the only evidence relied upon by the suspending officer.

> arrest, a search warrant, or a preliminary hearing. This is less than must be shown at trial, but it must be more than uncorroborated suspicion or accusation."

The protesters argue, citing Novicki v. Cook, 946 F.2d 938 (D.C. Cir. 1991), that the evidence was not sufficient to support imputing Boehm's misconduct to Mr. Stadlbauer because a person's association with or status in a company is not evidence showing that the person had reason to know of the company's conduct.

Novicki involved a debarment of a company president, which was imputed from the misconduct of the debarred company and which the court found was not supported by the record. The court found unrefuted, countervailing evidence in the record that the president did not participate in, have knowledge of, or have reason to know of the misconduct during the period in question, such that the company's misconduct could be imputed to the president. The court also found that the agency apparently only found that the president "should have known" of the debarred company's misconduct--which is significantly different from finding that he had "reason to know" of the misconduct.

We find Novicki to be distinguishable from the present protests for a number of reasons. First, Novicki involved a debarment, which, as detailed above, must be supported by the preponderance of the evidence after the debarred contractor or individual has been given the opportunity to present evidence, whereas a suspension need only be supported by adequate evidence and much more limited due process is required. That is to say, evidence that is insufficient to debar a person for having reason to know of a debarred company's misconduct may be sufficient evidence to suspend that person.

In addition, in Novicki, there was unrefuted evidence that the president did not have knowledge of the activities related to the misconduct in question during the relevant period and, thus, did not have reason to know of the misconduct. In contrast, there was no countervailing evidence at the time of the suspension that indicated that Mr. Stadlbauer had no reason to know of Boehm's misconduct; Mr. Stadlbauer's suspension was based entirely on the fact that he was authorized to sign bids on behalf of Boehm and no other evidence had been accumulated.

The protesters assert that the suspension official in these protests is applying the "should have known" standard proscribed by Novicki in imputing Boehm's misconduct to Mr. Stadlbauer solely by virtue of his status in Boehm, instead of the "reason to know" standard required by

FAR § 9.406-5(b). The court in Novicki referenced the definition of "reason to know" appearing in the Restatement (Second) of Agency § 9 comment d (1958) as an appropriate guide for determining whether a company's misconduct can be imputed to an individual associated with the company. That section states in pertinent part:

> "A person has reason to know of a fact if he has information from which a person of ordinary intelligence, or of the superior intelligence which such person may have, would infer that the fact in question exists or that there is such a substantial chance of its existence that, if exercising reasonable care with reference to the matter in question, his action would be predicated upon the assumption of its possible existence. The inference drawn need not be that the fact exists; it is sufficient that the likelihood of its existence is so great that a person of ordinary intelligence, or of the superior intelligence which the person in question has, would, if exercising ordinary prudence under the circumstances, govern his conduct as if the fact existed, until he could ascertain its existence or non-existence."

Based on the foregoing standards, we find the agency reasonably imputed Boehm's misconduct to, and properly suspended, Mr. Stadlbauer. That Mr. Stadlbauer was authorized to sign bids is relevant to whether he participated in, knew of, or had reason to know of Boehm's misconduct because it is reasonable to believe that a person who is entrusted with the power to bind a contractor to perform under a contract would be substantially involved with the contracting activity. See Caiola, 851 F.2d 395, 401 (it may be proper to infer the extent of a person's involvement in the activities of a firm purely by his or her title). Given that the Boehm suspension involved obtaining government contracts through bribery, the suspension official reasonably could determine that there was reasonable belief, i.e., adequate evidence, in the absence of countervailing evidence, that a person authorized to sign bids for Boehm would have information from which he or she reasonably could infer that there was misconduct on the part of the contractor, regardless of whether that person had actual knowledge of the misconduct itself.

Thus, even though Mr. Stadlbauer ultimately persuaded the suspension official that he had no reason to know of Boehm's misconduct, the suspending official reasonably could find that he had adequate evidence to suspend Mr. Stadlbauer, based on his apparent status in Boehm, pending a complete investigation of the matter. While the protesters assert

that the agency should have further investigated the matter before suspending Mr. Stadlbauer to ascertain his exact relationship with Boehm and his knowledge of Boehm's misconduct, we cannot say that the Army's suspension of Mr. Stadlbauer was only based on "uncorroborated suspicion or accusation"; rather, as stated above, the Army had adequate evidence to suspend Mr. Stadlbauer and was under no legal obligation to further investigate the matter prior to the suspension action. See Horne Bros., 463 F.2d 1268, 1271. Under the circumstances we find nothing improper in the Army's suspension of Mr. Stadlbauer. In this regard, a basic purpose of a suspension is to protect the government by temporarily prohibiting a contractor who is suspected of misconduct, e.g., bribery of government officials, from receiving contracts for a short period of time while a complete investigation of the suspected misconduct is completed. See Horne Bros., 463 F.2d 1268.

The protesters allege that the imposition of the suspension on September 17, just days before the bid openings and contract awards was arbitrarily timed to avoid making awards to Mr. Stadlbauer and TS Generalbau without affording the protesters due process. This charge is not supported by the record. It is true that a contracting officer recommended suspension of Mr. Stadlbauer nearly 3 months before the suspending officer imposed the suspension. The Army explains that the length and timing of the processing period was reasonable and expeditious considering the workload of the suspending official,[4] and considering that he did not have information on pending procurements. The agency's contention that Mr. Stadlbauer's suspension was not arbitrarily timed to avoid making award to the protesters is confirmed by the fact that Boehm was recommended for suspension and was suspended on the same dates as Mr. Stadlbauer. Since Boehm was suspected of bribing government employees, the government's interest would have been best served to suspend Boehm as soon as was possible and it is not reasonable to assume that the Army delayed Boehm's suspension in order to harm Mr. Stadlbauer. Thus, there is no basis to conclude that the Army timed the suspension with an intent to harm the protesters.

The protesters allege that they were denied due process because the notice of suspension to Mr. Stadlbauer did not provide enough information about the grounds for suspension to permit a timely, meaningful response. We disagree.

Due process in suspension cases requires notice sufficiently specific to enable the suspended party to marshal evidence

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[4]The Army has only one suspension official in its European division.

in its behalf so as to make the subsequent opportunity for response meaningful. Transco, 639 F.2d 318, 324. The notice of suspension is to include information advising the party: (1) that it is temporarily suspended; (2) of the causes for suspension relied upon under FAR § 9.407-2; (3) of the irregularities forming the basis for the suspension in terms sufficient to place the party on notice without disclosing the government's evidence; and (4) that it may respond in opposition to the suspension within 30 days from receipt of the notice. FAR § 9.407-3(c).

We find that the suspending official's suspension notice to Mr. Stadlbauer complied with these requirements and Mr. Stadlbauer was afforded the level of due process to which he was entitled. Specifically, the notice, which the Army sent to Mr. Stadlbauer at Boehm's address, informed Mr. Stadlbauer that his suspension was based on evidence that Boehm had paid bribes to employees of the United States in order to obtain contracts. Mr. Stadlbauer appealed these suspensions on November 4, over a month after his suspension was imposed and the awards under the IFBs had been made. There is no indication that the Army refused Mr. Stadlbauer information when he requested it or that the belated appeal of the suspensions by the protesters was caused by the Army's actions. Within a few days of the appeal, the suspensions were terminated. Under the circumstances, we think that he had a meaningful opportunity to fairly present his case.

The protesters suggest that they would have provided their evidence refuting the basis for suspension to the Army prior to Mr. Stadlbauer's suspension if they had known that it was pending--which would have allowed them to be eligible for award under the IFBs--and the Army therefore should have inquired before the suspension. There is no legal requirement that the Army inform persons of proposed suspensions; nor is this a denial of due process because submission of evidence by the suspended party is properly done in its post-suspension response to the action. FAR § 9.407-3(b); see Transco, 639 F.2d 318, 322-23.

TS Gereralbau argues that, even if Mr. Stadlbauer was properly suspended and afforded due process, TS Generalbau was denied due process, since it was improperly determined ineligible for award as an affiliate of a suspended party before it received notice of suspension pursuant to FAR § 9.407-1(c), which allows the suspending official to extend the suspension decision to include any affiliates of the suspended contractor. That regulation requires the suspending official to specifically name the affiliate being suspended and give it written notice of the suspension with an opportunity to respond.

The record confirms that TS Generalbau was not given proper notice of its suspension as an affiliate as required by FAR § 9.407-1(c). Indeed, such written notice was not given until November 1, more than a month after Mr. Stadlbauer's suspension and the awards under the IFBs. However, the Army's failure to give proper written notice is a mere procedural defect that did not deprive TS Generalbau of due process. Exactly what process is due a contractor is something to be determined not on the general regulations, but on the facts specifically involved. ATL, Inc. v. United States, 736 F.2d 677, 682 (Fed. Cir. 1984). Where a suspended affiliate of a suspended person had actual notice of the intended suspension and, thus, an opportunity to respond, the agency's failure to give timely written notice of the suspension is a mere procedural defect that does not diminish the affiliate's ineligibility for award. S.A.F.E. Export Corp., 65 Comp. Gen. 530 (1986), 86-1 CPD ¶ 413, aff'd, B-222308.2 et al., July 8, 1986, 86-2 CPD ¶ 44. An affiliate has actual notice of suspension where the suspended party to which it is affiliated had proper notice, and the ownership and control of the suspended firm is the same as the affiliate. Id.

Mr. Stadlbauer was given proper notice of his suspension and was provided a meaningful opportunity to respond to the suspension. Mr. Stadlbauer is the sole owner and president of TS Generalbau. Prior to TS Generalbau's incorporation in July 1991, Mr. Stadlbauer conducted his business as a sole proprietorship beginning in 1986. The protesters describe the proprietorship as the predecessor to TS Generalbau, and TS Generalbau listed itself on a solicitation mailing list application, SF 129, as being in business since 1986, the same year that Mr. Stadlbauer began business as a sole proprietorship. The protesters state that Mr. Stadlbauer's business activities have occurred continuously, first through his sole proprietorship and recently through TS Generalbau. The protesters' behavior establishes that Mr. Stadlbauer and TS Generalbau consider themselves to be essentially the same entity, and we find this to be the case.

We conclude that the notice to Mr. Stadlbauer served as notice of suspension to TS Generalbau. There is no evidence that Mr. Stadlbauer's alterego, TS Generalbau, would or could have done anything more than did Mr. Stadlbauer, had it received a separate notice. Given the obvious nature of the affiliation of the protesters, the Army's treatment of TS Generalbau as an ineligible contractor, by virtue of Mr. Stadlbauer's suspension, was reasonable. The procedural defect of failing to classify TS Generalbau as an affiliate and providing it separate notice did not affect the propriety of the Army's determination that TS Generalbau was

ineligible for award and the concomitant rejection of the protesters' bids under the IFBs. Id.

The protesters argue that they should receive awards under the IFBs because their suspensions have been terminated and no performance has occurred under the contracts awarded under the IFBs. We disagree. FAR § 9.405(a) prohibits the award of contracts to contractors who are debarred, suspended, or proposed for debarment. In addition, FAR § 14.404-2(h) requires the rejection of bids received from any person or concern that is suspended or debarred as of the bid opening date. The contracting officer does not have the discretion to make awards to firms who were suspended as of the time of bid opening, even where the suspensions are terminated before award is made. See Southern Dredging Co., Inc., 66 Comp. Gen. 300 (1987), 87-1 CPD ¶ 245; Instruments by Precision Ltd., Inc., B-235339, Aug. 14, 1989, 89-2 CPD ¶ 138; J. M. Cashman, Inc., B-225558, Apr. 15, 1987, 87-1 CPD ¶ 411. Also, where a determination that a contractor is suspended is reversed or terminated, this action does not affect the propriety of the rejection of a bid or offer of a firm that was properly suspended at the time of award or bid opening, or the award to an eligible bidder. See Tracor Applied Sciences, Inc., B-221230.2 et al., Feb. 24, 1986, 86-1 CPD ¶ 189; Atchison Eng'g Co., B-208148.5, Aug. 30, 1983, 83-2 CPD ¶ 278.

Since the record shows that the protesters' bids were properly rejected because they were suspended at that time, the awards to the next low bidders were proper. Indeed, given that the protesters were ineligible for award at the time awards were made, it would not be proper to terminate the properly awarded contracts in order to make awards to the protesters. See Southern Dredging Co., Inc., supra.

The protests are denied.

for James F. Hinchman
General Counsel